

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

)	
FIBER TECHNOLOGIES NETWORKS, L.L.C.)	
)	
Complainant,)	
)	
v.)	D.T.E. 01-70
)	
TOWN OF SHREWSBURY ELECTRIC)	
LIGHT PLANT)	
)	
Respondents.)	
)	

**REVISED PROCEDURAL SCHEDULE PROPOSED BY
FIBER TECHNOLOGIES NETWORKS, L.L.C.**

Pursuant to the Hearing Officer Memorandum dated December 17, 2001, Fiber Technologies Networks, L.L.C. ("Fibertech") proposes a two-stage procedural schedule. Fibertech first proposes going directly to cross-motions for summary judgment to address competing threshold legal positions of each of the parties. Only if the case cannot be resolved as a matter of law on the basis of these contentions would any further discovery and a hearing then be needed.

In this light, Fibertech proposes the following schedule:

Submission of a joint statement of uncontroverted facts	January 14, 2002
Filing of cross-motions for summary judgment	January 18, 2002
Filing of reply briefs	January 30, 2002
Responses to further discovery required by any rulings on motions to compel	Ten days after issuance of decision
Hearing dates	31 days after issuance of decision

Simultaneous filing of briefs	21 days after hearing
Filing of replies	10 days after final briefs

Fibertech agrees to waive the Department's 180-day deadline by the number of days between January 11, 2002 and the actual date for filing final replies. In the event that the Department concluded after the motions for summary judgment that there are material disputed issues that warrant a hearing, Fibertech also would be willing to dismiss and refile its Complaint with the understanding that the record to date of this proceeding would be binding on the parties.

If the Department wishes to proceed to a hearing without a summary judgment stage, Fibertech proposes in the alternative a hearing schedule as follows:

Hearing dates	January 8 and 10, 2002
Simultaneous filing of briefs	January 29, 2002
Reply briefs filed	February 8, 2002

The 180 day deadline would be tolled on the same basis as above.

Background

SELP has denied Fibertech access to its poles on the purported basis that a dark fiber carrier cannot be a licensee within the meaning of G.L. c.166 §25A. *See Response of Shrewsbury's Electric Light Plant* (filed September 17, 2001) ¶28 ("SELP specifically denies that Fibertech's business of leasing dark fiber constitutes a 'telecommunications service' or that Fibertech actually 'transmits' intelligence by telephone or electricity"); further answer ¶ 4 ("Fibertech is not incorporated for the transmission of intelligence by electricity or telephone because '[d]ark fiber' means fiber that is not connected to any equipment capable of transmitting information"); ¶ 7(Fibertech is not a "licensee" because it "does not offer its dark fiber 'service'

to the general public”); ¶ 8 (“Fibertech is not a ‘licensee’ within the meaning of G.L. c. 166, §25A and C.M.R. 45.02”). That Fibertech is a dark fiber provider is an established fact in this proceeding: it is stated in Fibertech’s complaint,¹ acknowledged in SELP’s pleadings,² and asked and answered in several SELP information requests.³

While SELP contends that a dark fiber provider is per se disqualified as a “licensee” for purposes of G.L. c.166 §25A, Fibertech contends that the facts dispositive are (1) that its fiber optic cable is for transmission of telecommunications, or (2) that it is authorized as a common carrier pursuant to G.L. c. 159 § 12 by virtue of meeting the DTE’s entry requirements. Fibertech can demonstrate if necessary that its services are an important segment of the competitive telecommunications marketplace 220 C.M.R. 45.00 is meant to foster, as reflected in the prefiled testimony of Scott Lundquist. It also can demonstrate through SELP’s evidence that SELP’s exclusion of Fibertech is blatantly anticompetitive and discriminatory. Hearing also may involve evidence of Fibertech’s dealings with customers in New York and Connecticut if SELP’s motions to compel are granted. Fibertech nonetheless believes this case can be resolved on the narrower issues. If so – if either SELP is right or Fibertech is right in their per se legal contentions – there is no need to reach additional factual issues.

SELP argued with respect to the initial procedural schedule for proceeding without a hearing altogether. See *Shrewsbury’s Electric Light Plant’s Comments on Proposed Procedural Schedule, Scope of Proceedings and Opposition to Motion of Fiber Technologies Networks, L.L.C. To Change The Order of Presentation*, DTE 01-70, pp. 1-3 (filed Oct. 22, 2001). In its

¹ *Complaint of Fiber Technologies Networks, L.L.C.*, DTE 01-70, ¶¶ 4, 8. 26-29 (filed Aug. 27, 2001).

² *Response of Shrewsbury’s Electric Light Plant*, DTE 01-70, ¶¶ 2, 21, 28, allegation ¶ 4 (filed Sept. 17, 2001). See also *Shrewsbury’s Electric Light Plant’s Comments on Proposed Procedural Schedule, Scope of Proceedings and Opposition to Motion of Fiber Technologies Networks, L.L.C. To Change The Order of Presentation*, DTE 01-70, pp. 1, 4 (filed Oct. 22, 2001).

³ See *First Set of Information Requests by Shrewsbury’s Electric Light Plant*, DTE 01-70, SELP 1-6, 1-7, 1-15 (filed Nov. 2, 2001); *Second Set of Information Requests by Shrewsbury’s Electric Light Plant*, DTE 01-70, SELP 2-7, 2-8, 2-9 (filed Nov. 16, 2001).

letter to the Department dated October 22, 2001, Fibertech left open that possibility, noting that “[e]ither party is free to move for summary judgment if appropriate” Each party believes its per se argument is determinative. Summary judgment at this stage puts these positions to the test. The Department has stated that summary judgment is appropriate if a review of the materials on file shows that there is no genuine issue of material fact and the asking party is entitled to judgment as a matter of law. *Cambridge Electric Light Co./MIT*, D.P.U. 94-101/95-36 (1995) (citing *Re Altresco Lynn, Inc./Commonwealth Electric Co.*, D.P.U. 91-142/91 at p. 10 (1991)).

In addition to avoiding hearing, summary judgment may obviate the need for the Department to rule on pending discovery motions and for the parties to address any further discovery that rulings on these motions might engender. Even if the Department finds the issues in dispute are material to a decision in this matter (in which event, Fibertech reserves its right to a hearing), summary judgment will serve to narrow and focus the issues for hearing.

Because of its efficiency, Fibertech urges a two-stage process consistent with the schedule above.

Respectfully submitted,

Cameron F. Kerry, BBO# 269660
Kimberly C. Collins, BBO#643405
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Attorneys for Fiber Technologies Networks, L.L.C.

OF COUNSEL:

Charles B. Stockdale
Robert T. Witthauer
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, New York 14618
(716) 697-5100

Dated: December 18, 2001